LIBRARY
SUPREME COURT, U. S.

FILED
JAN 26 1970
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 926 and 892

DUDLEY E. BINYON and
MAGNA OIL CORPORATION, ET AL
Petitioners,

v.

PHILIP B. BATESON
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT H. HUGHES,
McKENZIE and BAER,
WILLIAM A. McKENZIE,
JOE E. VAUGHAN,
CHARLES F. GUITTARD,
2222 LTV Tower,
Dallas, Texas,
Counsel for Respondent.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 1455 ROUND TABLE DRIVE — DALLAS — 631-3130

INDEX

	Page
Citation to Opinion Below	1
Questions Presented	1
Statement of the Case	2
Argument	3
Conclusion	13

Page

Cases

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 2, 4, 6, 7

Gresov v. Shattuck Denn Mining Corp., 243 N.Y.S. 2d 760 (N.Y. Sup. 1963) 12

Henis v. Compania Agricola de Guatemala, 210 F. 2d 950 (3rd Cir. 1954), 116 F. Supp. 223 (U.S. Del. 1953) 1, 4, 5, 6

Kenrich Corp. v. Miller, 377 F. 2d 312 (3rd Cir. 1967) 2, 4, 8, 9, 10, 11

Maclary v. Pleasant Hills, Inc., 109 A. 2d 830 (Del. Ch. 1954) 12

Newkirk v. W. J. Rainey, Inc., 76 A. 2d 121 (Del. Ch. 1950) 12

Palmer v. Morris, 316 F. 2d 649 (5th Cir. 1963) 5

Rosenthal v. Burry Biscuit Corp., 60 A. 2d 106 (Del. Ch. 1948) 12

Weinhaus v. Gale, 237 F. 2d 197 (7th Cir. 1956) 1, 3, 5, 6

Statutes

F.R.C.P. Rule 23 7

F.R.C.P. Rule 23.1 ..... 2, 4, 5, 6, 7, 8, 10, 11, 12, 13

In the

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 926 and 892

DUDLEY E. BINYON and
MAGNA OIL CORPORATION, ET AL

Petitioners,

v.

PHILIP B. BATESON

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 414 F. 2d 128, and is printed in Appendix A hereto, infra, page A-1.

QUESTIONS PRESENTED

1. Whether the opinion below conflicts with *Weinhaus v. Gale*, 237 F. 2d 197 (7th Cir. 1956) and *Henis v. Compania*

Agricola de Guatemala, 210 F. 2d 950 (3rd Cir. 1954), 116 F. Supp. 223 (U.S. Del. 1953), which decisions hold that a plaintiff in a stockholder derivative suit may not predicate standing to sue under Rule 23.1 on a mere allegation of continuing wrongs without any basis in his complaint to support such allegation.

2. Whether the opinion below conflicts with *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) as to whether under Rule 23.1 Respondent would have standing to bring a stockholder derivative action for Petitioners' continuing wrongs to Magna.

3. Whether the opinion below conflicts with *Kenrich Corp. v. Miller,* 377 F. 2d 312 (3rd Cir. 1967) as to whether under Rule 23.1 a stockholder who held stock during the entire time of the transactions he complains of except for a period of two and a half months, who knew of some of the transactions during that same time he held stock, who sold his stock but shortly thereafter repurchased stock and sued for all transactions continuing at the time of his repurchase of stock as continuing wrongs, has standing to sue.

STATEMENT OF THE CASE

The Statement of Facts in Petitioners' Petitions are generally complete and accurate except as set out below.

1. Petitioners fail to mention the transactions alleged in Respondent's Amended Original Complaint to have their inceptions after Respondent's July 22, 1967 repurchase of stock, concerned with mismanagement of St. John Gas Field

and the unauthorized use of company funds to pay G. B. Howell's personal apartment rent (R. 97-9 and 96-7). These transactions were not mentioned by the Fifth Circuit in its opinion as they were not required to support same.

2. At the time of filing the suit on September 21, 1967, Respondent was the holder of one hundred (100) shares of Magna stock, and has continuously held and owned said one hundred (100) shares of stock from July 21, 1967, to the filing of the suit on September 21, 1967. Moreover, the Fifth Circuit found that Respondent owned several hundred shares of Magna stock continuously from 1956 to May 5, 1967 (infra, page A-2).

3. Petitioner Binyon on page 6 and Petitioners' Magna, et al, on page 4 of their respective Petitions state that the allegation by Respondent in his Amended Original Complaint concerning Petitioner G. B. Howell's violation of 15 U.S.C.A. § 78p dealing with insider restrictions would only involve Howell and none of the other Petitioners. However, such is obviously not necessarily true since discovery, *entirely denied to* Respondent in the District Court, could easily show complicity, assistance, knowledge, and acquiescence of the other Director Petitioners in G. B. Howell's insider violation.

ARGUMENT

Petitioners' reasons for granting the writ are primarily asserted conflicts between the opinion below and three opinions of other Circuit Courts, *Weinhaus v. Gale*, 237 F. 2d

197 (7th Cir. 1956), *Henis v. Compania Agricola de Guatemala*, 210 F. 2d 950 (3rd Cir. 1954), 116 F. Supp. 223 (U.S. Del. 1953), and *Kenrich Corp. v. Miller*, 377 F. 2d 312 (3rd Cir. 1967), and an asserted conflict between the opinion below and the opinion of this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Petitioners' Petitions contain in addition, although not urged specifically as reasons for granting the writ, their individual conclusions as to the true meaning and purpose of Rule 23.1 and a group of state decisions in shareholder derivative suits, all of which are offered as general support of Petitioners' position and to convey the impression that the court below erred in its holdings.

Respondent's reply, to be developed in this Brief in Opposition, is that Petitioners' asserted conflicts are illusory and that the decision of the Fifth Circuit below is clearly correct.

(1) Petitioners argue that the *Weinhaus* and *Henis* cases, supra, conflict with the Fifth Circuit opinion (Binyon's Petition: Reason (1), pages 7-10; Magna's, et al, Petition: Reason (3), page 7). The first step in this argument in both Petitions is to state the holding in *Weinhaus* and *Henis;* namely, that the mere allegation in a plaintiff's complaint that wrongs continued after he purchased his stock, without any basis in the complaint to support such allegation, is insufficient to satisfy the requirement of contemporaneous ownership under Rule 23.1. Petitioners get no argument from Respondent at this point.

However, Petitioner Binyon, as the concluding part of his argument, and without so much as quoting a single statement from the Fifth Circuit opinion, asserts in effect that the Fifth Circuit's language may be "paraphrased" to say that the mere allegation that a wrong is continuing, without more, is in fact sufficient to fulfill the requirement as to contemporaneous ownership under Rule 23.1. In other words, according to Petitioner Binyon the Fifth Circuit opinion stands for exactly the opposite position to that expressed in *Weinhaus* and *Henis*. However, nothing could be further from the truth and a reading of the fifth and sixth paragraphs of the Court's opinion (infra, page A-3), which Petitioner refers to in support of his view, precludes any such interpretation. In the sixth paragraph the Court cites *Palmer v. Morris*, 316 F. 2d 649 (5th Cir. 1963) as authority on the question of guidelines and tests for continuing transactions:

> " 'Each of the counts . . . sufficiently stated the facts and circumstances touching on the alleged illegality of the payments currently being made so that these counts could not be dismissed as dealing only with transactions that had completely occurred and been terminated prior to plaintiff's acquisition of his stock. We are unable upon the basis of the record itself to determine that as a matter of law these counts failed to assert illegal conduct by the officers of the company subsequent to the acquisition of the stock by the plaintiff and at a time when he had a right to complain thereabout.' *Id.* at 650."

The above quotation is obviously not simply consistent with *Weinhaus* and *Henis* but is in complete support of their mutual holding that the counts in plaintiff's complaint must

sufficiently state a basis for the allegation of continuing transactions (or continuing wrongs).

Petitioners Magna, et al, on the other hand, in their attempt to establish a conflict, neither endeavor to quote specific language of the Fifth Circuit opinion, nor to paraphrase any of its language, nor to refer to any particular paragraph or paragraphs, nor to do anything at all except to put on record their conviction once again that the Fifth Circuit opinion conflicts with *Weinhaus* and *Henis.*

Petitioners Magna, et al, do, however, make reference in passing to a contention they had maintained earlier in the proceedings; namely, that Respondent's Original Complaint did not sufficiently state a basis for the allegation of "continuing wrongs." However, very conspicuous by their absence are any mention of Respondent's First Amended Original Complaint, of which the adequacy of its allegations as to continuing wrongs is uncontroverted; any arguments as to why Respondent would not be entitled to amend; any arguments as to what connection this particular contention has to the Fifth Circuit opinion; or any arguments as to the relevance of this particular contention to any ground upon which Petitioners may petition the Supreme Court for a writ of certiorari.

(2) Petitioners assert as a second reason for granting certiorari that the *Cohen* case, supra, conflicts with the Fifth Circuit opinion in the application of Rule 23.1 (Binyon's Petition: Reason (2), pages 10-13; Magna's, et al, Petition: Reason (5), page 8-9). This position is maintained

vigorously and at considerable length. However, almost all of Petitioners' efforts in this regard are given over to developing and urging their own individual conclusions and feelings and there is virtually no discussion of the cases themselves or the conflict which Petitioners maintain is present.

That the two cases are not even remotely in point is readily seen by examining them. The central issues in *Cohen* were the constitutionality of a New Jersey statute requiring a stockholder-plaintiff in a stockholder derivative action to put up security for his derivative action, and the applicability of this statute in federal district court in a diversity case. The Court ruled that the statute was constitutional and that it applied in federal district court under the facts of that case. In short, *Cohen* is not in point. In the first place, *Cohen* does not purport to be a discussion of the purpose and application of Rule 23.1 or one of its parent rules. Rather it is a discussion as to whether the New Jersey statute was substantive or had some substantive aspect or, on the other hand, was wholly procedural and therefore whether it should be applied in addition to Rule 23. Secondly, and of equal if not more importance, is the fact that *Cohen* does not involve a plaintiff who alleged continuing wrongs as his cause of action and that, moreover, neither Justice Jackson's majority opinion nor the other opinions in the case discuss or mention the doctrine or the concept of continuing wrongs.

The *Cohen* case is simply of no help one way or the other in the present lawsuit and consequently can be of no help to Petitioners on petition for certiorari.

(3) Petitioners maintain as a third reason for granting certiorari that the *Kenrich* case, supra, conflicts with the Fifth Circuit opinion as to whether a stockholder who held stock during the entire time of the transactions he complains of except for a period of two and a half months, who knew of some of the transactions during that same time he held stock, who sold his stock but shortly thereafter repurchased stock and sued for all transactions continuing at the time of his repurchase of stock as continuing wrongs, has standing to sue under Rule 23.1. In addition, Petitioners argue that the Fifth Circuit opinion is erroneous. (Binyon's Petition: Reason (3), pages 13-17; Magna's, et al, Petition: Reason (2), pages 5-6.)

In reply, Respondent states that again Petitioners have gone far afield in their efforts to establish a conflict; that the *Kenrich* case and the present case are very dissimilar and, contrary to Petitioners' contention, were decided on very different facts and issues; that, accordingly, as shown below, the present case may be distinguished in several important respects from *Kenrich;* and that the Fifth Circuit opinion in the present case is clearly correct.

In *Kenrich*, the plaintiff was a former president, director and shareholder who had sold his stock and had ceased to hold all corporate office. Two (2) years later he brought suit upon the basis of an assignment agreement from the Kenrich Corporation of its cause of action against the former directors of a corporation which had been merged into the

Kenrich Corporation, the terms of which assignment agreement having been the following:

> "Further, Kline shall have the right to institute suit on behalf of Kenrich and *retain 66⅔% of the proceeds thereof* after payment of legal and all other expenses and fees in connection therewith (for which he shall be liable), in the event Kenrich shall fail to prosecute suit within 90 days after Kline shall have presented to it the factual basis for such claim, together with his request that it so prosecute. However, if upon the making of such request, Kenrich shall proceed with due diligence to prosecute such suit, at its own expense, then Kline shall be entitled to 25% of such proceeds. If in the latter event, suit is not instituted by Kenrich within 90 days, then Kline may proceed as set forth in the first sentence of this subparagraph." (Kenrich, supra, at 314.) (Emphasis is Respondent's).

The Third Circuit in *Kenrich* discussed Plaintiff Kline's standing to sue, both in a direct action and in a stockholder's derivative action. The Court held that the Plaintiff could not sue directly since the assignment agreement was champertous and violated the laws of the forum state of Pennsylvania. The Court's second and most important holding was that the Plaintiff could not sue derivatively since he was neither the legal nor equitable owner of stock at the time of suit, and therefore could not be recognized as having an interest which could be vindicated in equity. The Court stated:

> "True, a *stockholder* has interest in such claims and, if the corporation refuses to act, may vindicate that interest in equity through a stockholder's derivative suit . . . But in Delaware where this business is incorporated, as elsewhere, *only one who is the legal or*

equitable owner of stock at the time of suit is recognized as thus interested." (*Kenrich*, supra, page 314.) (Emphasis is Respondent's).

Briefly, the wide disparity of facts and of issues between *Kenrich* and the present case may be summarized as follows: in *Kenrich*, the plaintiff held no shares at the time of suit and was not financially interested in the corporation; rather, the plaintiff sued on the basis of a champertous assignment agreement which set out his percentage of whatever recovery he was able to obtain; moreover, plaintiff did not charge continuing wrongs as his cause of action; further, the Court held that plaintiff had no standing to sue derivatively inasmuch as he had sold all of his stock, had none at the time of filing of the suit, and therefore obviously was not a proper person to bring a stockholder's derivative suit; and finally, it should be stressed that *Kenrich* does not even purport to be a discussion of Rule 23.1, or one of its parent rules nor is Rule 23.1 mentioned anywhere in the entire opinion.

On the other hand, in the present case, Respondent was in fact the holder of stock at the time of institution of suit and was consequently financially interested in Magna; further, Respondent sued derivatively and in behalf of the stockholders generally as a representative of the stockholders and not by way of a percentage interest under an illegal and champertous assignment of a cause of action; moreover, Respondent charged continuing wrongs primarily as his cause of action; and finally, the Fifth Circuit opinion in the present case may be readily distinguished from the opinion in the *Kenrich* case in that the Fifth Circuit points out that the plaintiff in *Kenrich* owned no stock, that he did not

assert standing to sue on the basis of stock ownership but rather on the basis of an illegal and champertous assignment, and that therefore by instituting a suit on such an agreement, plaintiff was not pursuing a suit for recovery in behalf of shareholders but a suit which was expressly an instrument for the plaintiff's personal recovery. And, lastly, the Fifth Circuit opinion is clearly an opinion on Rule 23.1, whereas the *Kenrich* opinion equally clearly was not.

Hence, the *Kenrich* case is simply not in point.

(4) As a fourth reason for granting certiorari, Petitioners argue briefly that the Fifth Circuit erred in the present case by failing to apply the substantive law of Delaware (Magna's, et al., Petition: Reason (4), pages 7-8; Binyon does not join in this argument). Petitioners contend that in this case the state and federal laws are the same and therefore both should be applied so as to avoid forum shopping. The end result, Petitioners stress, would be to bar Respondent's suit.

As a preface to Respondent's reply, Respondent would point out that although the meaning of Petitioners' argument is not entirely clear, he nevertheless offers the following in reply. First, Petitioners state no reason as to the relevance of the law of the State of Delaware to grounds upon which a petition for writ of certiorari may be granted. Second, Petitioners offer no evidence and in fact could offer no evidence to support Petitioners' implied premise that the Delaware law conflicts with the Fifth Circuit opinion. And third, if as Petitioners say, (and Respondent would not deny it) federal and Delaware law are the same in this case, it

would seem to make little or no difference which law is applied.

(5) Petitioners Magna, et al., as a fifth reason for granting certiorari advance the broad contention that the decision of the Fifth Circuit is "in conflict with every authority which has considered this question." (Magna's, et al., Petition: Reason (5), pages 8-9; Binyon does not join in this argument). In support of this contention, Petitioners seek to draw the Court's attention to three (3) Delaware cases and also to one (1) New York case: *Rosenthal v. Burry Biscuit Corp.*, 60 A. 2d 106 (Del. Ch. 1948); *Maclary v. Pleasant Hills, Inc.*, 109 A. 2d 830 (Del Ch. 1954); *Newkirk v. W. J. Rainey, Inc.*, 76 A. 2d 121 (Del Ch. 1950); and *Gresov v. Shattuck Denn Mining Corp.*, 243 N.Y.S. 2d 760 (N.Y. Sup. 1963).

In reply to this point, Respondent would state that despite the broad assertions in Petitioners' "fifth reason," Petitioners have not presented to the Court their reasoning for the conclusion that the above four cases conflict with the Fifth Circuit opinion or any reasoning as to how these four cases would be relevant to grounds for certiorari even if they did. Moreover, Respondent submits that these cases clearly do not present a conflict with the present case.

(6) Petitioners, in addition, at various places in their Petitions advance their individual conclusions and perceptions as to the meaning and purpose of Rule 23.1, citing in an abstract and inconclusive manner the cases Respondent has already argued are not in point (Respondent's Points 1, 2 & 3). According to Petitioners the Fifth Circuit violated

the spirit of Rule 23.1 when it held that Respondent was no stranger to Magna and therefore was not barred from bringing his suit.

Respondent would reply only that the Fifth Circuit opinion, far from offending the spirit of Rule 23.1, did in fact understand and preserve its real purpose when it recognized that Respondent "bears no resemblance to the outsider who finds out about intra-corporate misconduct and buys stock to foment litigation" and that rather it is the Petitioners who have lost sight of the purpose of Rule 23.1 (Infra, page A-5). The decision of the Fifth Circuit is clearly correct.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this petition for a writ of certiorari should be denied.

January 20, 1970.

Robert H. Hughes

ROBERT H. HUGHES

McKENZIE and BAER,
WILLIAM A. McKENZIE,
JOE E. VAUGHAN,
CHARLES F. GUITTARD,
2222 LTV Tower,
Dallas, Texas,
Counsel for Respondent.

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26130

PHILIP B. BATESON,
Plaintiff-Appelllant,

versus

MAGNA OIL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(August 11, 1969)

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

THORNBERRY, Circuit Judge: The question presented is whether a stockholder who sold his stock and shortly thereafter re-acquired stock in the corporation for the purpose of filing a long-planned stockholders' derivative suit has standing to maintain the suit under Rule 23.1 of the Federal Rules of Civil Procedure. We hold that he does.

Appellant filed a stockholders' derivative suit on behalf of Magna Oil Corporation against the directors of the corporation. He seeks recovery for the benefit of the corporation for damages resulting to the corporation from alleged acts of fraud, mismanagement, conspiracy, and breach of

fiduciary duty on the part of the defendant directors. Appellant complained of six transactions, five of which are alleged to be continuing transactions begun before the filing of the action and continuing at the time of the filing of the suit.[1]

The five transactions that are alleged to be continuous in nature are: (1) That defendant Howell caused Magna to advance him money on open account and promissory note. (2) That defendant Howell caused Magna to buy an airplane which is used more for the benefit of Howell than for the Corporation. (3) That defendant Howell has caused Magna to pay him and his brother excessive salaries and expense allowances. (4) That defendant Howell has caused the Corporation's property to be mortgaged at a nearly prohibitive rate in order to secure the payment of Howell's personal indebtedness. (5) That defendant Howell has caused certain of Magna's oil and gas properties to be mismanaged.

Appellant owned several hundred shares of Magna stock continuously from 1956 to May 5, 1967. On the latter date all of his Magna stock was sold. Appellant stated in his deposition that he had intended to retain one or two hundred shares because "he had long since planned this suit." On July 21, 1967, appellant bought one hundred shares of Magna stock for the stated purpose of bringing this suit. He filed suit on September 21, 1967. The lower court dismissed the action, apparently on the basis that the "con-

[1] The sixth transaction complained of involves insider short-swing profits and an alleged violation of the Securities Exchange Act of 1934. It has been held that since an action to recover insider short-swing profits may be brought "by the owner of any security," 15 U.S.C.A. § 78p, plaintiff need not allege that he was a stockholder at the time of the transaction complained of. *Blau v. Mission Corp.*, 2d Cir. 1954, 212 F. 2d 77, cert. denied, 347 U.S. 1016, 74 S. Ct. 872, 98 L. Ed. 1138.

[2] Rule 23.1 requires, inter alia, that in a stockholder's derivative action, the complaint shall allege "that the plaintiff was a shareholder . . . at the time of the transaction of which he complains." This requirement serves the dual purpose of preventing a collusive attempt to invoke federal jurisdiction, *Hawes v. City of Oakland*, 1882, 104 U.S. 450, 26 L.Ed. 827, and of preventing a person from buying a lawsuit.

temporaneous ownership" requirement of Rule 23.1 had not been met.[2] Appellant appeals that decision.

The Rule makes it clear that one who buys stock in the corporation cannot maintain a stockholders' derivative suit if the wrongs complained of were completed before his acquisition of stock. However, where the complaint charged continuing wrongs, occurring at the time plaintiff owned stock, the complaint should not be dismissed on defendant's contention that the claims actually arose prior to the time plaintiff acquired his stock. 1 Barron & Holtzoff, *Federal Practice and Procedure* § 566, p. 303 (Wright ed. 1961); *Hoover v. Allen*, D.C.N.Y. 1960, 180 F. Supp. 263. In other words, the requirement that a shareholder must have owned stock at the time of the wrong of which he complains may be satisfied if the wrong is a continuing one; that is, if it "spans the plaintiff's ownership, or if new elements in a pattern of wrongful conduct occur after acquisition." Prunty, *Business Associations*, 35 N.Y.U.L. Rev. 1468 (1960).

This Court has set forth certain guidelines and tests for continuing transactions. In *Palmer v. Morris*, 5th Cir. 1963, 316 F. 2d 649, the plaintiff charged the defendants with wrongdoing for certain transactions entered into prior to plaintiff's acquisition of the stock. It was alleged, however, that the company was still paying out sums of money pursuant to the earlier transactions and that these sums of money, both in the form of allegedly non-beneficial services for the company and in the form of allegedly exorbitant rentals, were still being made. The Court stated:

> Each of the counts . . . sufficiently stated the facts and circumstances touching on the alleged illegality of the payments currently being made so that these counts could not be dismissed as dealing only with transactions that had completely occurred and been terminated prior to plaintiff's acquisition of his stock. We are unable upon the basis of the record itself to determine that as a matter of law these counts failed to assert illegal conduct by the officers of the company

> subsequent to the acquisition of the stock by the plaintiff and at a time when he had a right to complain thereabout.

The matters complained of in the present case are not wrongs that have "completely occurred and been terminated prior to plaintiff's acquisition of his stock," and therefore, under the *Palmer* test, are continuing wrongs. Thus it would seem that appellant has met the requirement of owning stock at the time of the wrong complained of because the alleged wrongs were continuing at the time he re-acquired stock in Magna.

Appellees claim, however, that this suit was properly dismissed because appellant had knowledge of the alleged wrongs at the time he re-acquired his stock, and stock acquired with such knowledge cannot give standing to sue regardless of whether the allegedly wrongful acts were "continuing wrongs." In support of this argument, appellees place strong reliance on *Kenrich Corp. v. Miller*, 3d Cir. 1967, 377 F.2d 312, in which the court stated that one who was a stockholder at the time of an alleged intracorporate wrong and *sells* his stock with knowledge of the wrong loses any rights he may have had to bring suit in behalf of the corporation. That case, however, is not in point. There, the plaintiff had been the president and principal stockholder in the company, but he had sold all of his stock two years before the suit was instituted. He sought to maintain the suit by way of an assignment from another stockholder, and there was a finding that the assignment was champertous. Clearly, there was strong reason for applying estoppel principles against that plaintiff, whose apparent purpose in maintaining the derivative suit was to gain personal profit.

Estoppel principles will also work to deny standing to a plaintiff who *buys* stock with knowledge of the wrongs of which he complains. *See, e.g., Von Schlemmer v. Keystone Life Ins. Co.*, 121 La.2d 987, 46 So. 991 (1908); *Wagner Electric Corporation v. Hydraulic Brake Co.*, 269 Mich. 560, 257 N.W. 884 (1934). While a *stranger* to the corporation who buys stock with knowledge of the alleged wrongs may

not maintain a derivative action even if the wrongs complained of are continuing wrongs, that rule is not applicable here. Appellant is no stranger to the corporation. He was a long-time stockholder of Magna who apparently was concerned with the management of the company, and had planned to bring a derivative suit as early as April, 1966. Although it is true that he sold his stock (allegedly through inadvertence), he brought back a hundred shares in the corporation shortly thereafter. He bears no resemblance to the outsider who finds out about intracorporate misconduct and buys stock to foment litigation. Appellees' argument that appellant does not have standing to maintain this action loses sight of the purpose of Rule 23.1. That purpose is to prevent the federal court from being used to litigate purchased grievances or from becoming a party to speculative suits against corporations. *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 556, 69 S. Ct. 1221, 1230, 93 L. Ed. 1541. Certainly, it cannot be said that appellant is litigating a purchased grievance. He is not a speculative litigator. Therefore, it would exalt form over substance to hold that appellant did not have standing to maintain this stockholders' derivative action. Appellant should have his day in court.

The order of the trial court dismissing the Complaint was erroneous and the order is VACATED and set aside. The case is REMANDED to the trial court for proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26130

D.C. DOCKET NO. 3-2241 CIVIL ACTION

PHILIP B. BATESON,
Plaintiff-Appelllant,

versus

MAGNA OIL CORPORATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby remanded to the said District Court for proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

August 11, 1969

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26130

PHILIP B. BATESON,

Appellant,

versus

MAGNA OIL CORPORATION, ET AL,

Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

ON PETITIONS FOR REHEARING

(October 23, 1969)

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge

PER CURIAM: It is ORDERED that the petitions for rehearing filed the above entitled and numbered cause be and the same are hereby denied, except that the first sentence of the first paragraph on page 5 of the slip opinion dated August 11, 1969, is modified to read as follows: "With the possible exception of transaction (1), the matters complained of in the present case are not wrongs that have 'completely occurred and been terminated prior to plaintiff's acquisition of his stock,' and therefore, under the *Palmer* test, are continuing wrongs."